RECORD AND BRIEF

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2016

MARION WILSON,

Petitioner,

-v-

WARDEN,
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

"My prediction is that the Supreme Court will decide the issue differently than the en banc majority and hold that the presumption in [*Ylst v. Nunnemaker*], governs." – *Wilson v. Warden*, 834 F.3d 1227, 1242 (11th Cir. 2016) (Jordan, J., dissenting).

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

Did this Court's decision in *Harrington v. Richter*, 562 U.S. 86 (2011), silently abrogate the presumption set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) – that a federal court sitting in habeas proceedings should "look through" a summary state court ruling to review the last reasoned decision – as a slim majority of the *en banc* Eleventh Circuit held in this case, despite the agreement of both parties that the *Ylst* presumption should continue to apply?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Marion Wilson, respectfully petitions this Court to issue a Writ of Certiorari to review the decision of the *en banc* United States Court of Appeals for the Eleventh Circuit entered in the above case on August 23, 2016. *See Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016).

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, sitting *en banc*, entered August 23, 2016, is reported as *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016). A photocopy of the decision is attached hereto as Appendix A. The panel decision vacated by the *en banc* Court's grant of rehearing is reported as *Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014), and a copy is attached hereto as Appendix B. The underlying federal habeas court decision (*Wilson v. Humphrey*, Case No. 5:10-CV-489 MTT, 2013 WL 6795024 (M.D. Ga. Dec. 19, 2013)) is

unreported and a copy is attached hereto as Appendix C. The underlying state habeas court order in *Wilson v. Hall*, Butts Co. Superior Court Case No. 2001-V-38, denying all relief is unreported and a copy is attached hereto as Appendix D. The order of the Georgia Supreme Court denying a certificate of probable cause to appeal ("CPC") is unreported and a copy is attached hereto as Appendix E.

JURISDICTION

The decision of the *en banc* Eleventh Circuit Court of Appeals was entered on August 23, 2016. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(e) as Petitioner asserts a deprivation of his rights secured by the Constitution of the United States, as well as Supreme Court Rule 11, permitting certiorari to a United States court of appeals before judgment.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Procedural History

On November 5, 1997, following a trial in the Superior Court of Baldwin County, Georgia, Mr. Wilson was convicted of malice murder of Donovan Parks, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. He was sentenced to death for malice murder; to life imprisonment for armed robbery; to twenty years' imprisonment for hijacking a motor vehicle; and to five years' imprisonment each for possession of a firearm during commission of a felony and possession of a sawed-off shotgun. The felony murder conviction was vacated by operation of law.

The Georgia Supreme Court affirmed on direct appeal, *Wilson v. State*, 271 Ga. 811 (1999), and summarily denied a motion for reconsideration on December 20, 1999. Mr. Wilson filed a petition for writ of certiorari in this Court, which was denied on October 2, 2000. *Wilson v. Georgia*, 531 U.S. 838 (2000). Mr. Wilson thereafter sought state post-conviction relief, filing a petition, and an amended petition, for writ of habeas corpus in the Butts County Superior Court.

On February 22-23, 2005, the state habeas court held an evidentiary hearing primarily devoted to Mr. Wilson's claims of ineffective assistance of counsel regarding trial counsel's penalty phase preparation and presentation. Mr. Wilson presented the live and affidavit testimony of Mr. Wilson's trial counsel, a gang expert, two law enforcement officers, family members, friends, teachers, social services workers, experts, and others. Respondent presented documentary materials, and the live testimony of an investigator for the District Attorney's office and a law enforcement officer.

In an order dated December 1, 2008, the state habeas court denied the petition. Doc.18-4 (hereafter "State Habeas Order"). The Supreme Court of Georgia, in a one-sentence order, summarily denied Mr. Wilson's application for certificate of probable cause to appeal ("CPC") on May 3, 2010. Doc.18-19 (*see* Appendix E). Mr. Wilson thereafter petitioned this Court for a writ of certiorari, which was denied on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

On December 17, 2010, Mr. Wilson filed his federal habeas petition in the district court. Doc.1. After briefing (Docs.43, 44, 47), the district court denied the petition and granted a certificate of appealability on "[w]hether trial counsel was ineffective during the penalty phase by failing to conduct a reasonable investigation into mitigation evidence and by failing to make a reasonable presentation of mitigation evidence." Doc.51 (Appendix C) at 108-09. Mr. Wilson filed a motion to alter or amend the judgment (Doc.53), which the district court denied (Doc.55). Mr. Wilson filed a notice of appeal on February 18, 2014. Doc.57. Mr. Wilson filed a motion seeking to expand the certificate of appealability, which the Eleventh Circuit denied (Doc.59).

On December 14, 2014, the Eleventh Circuit panel affirmed the district court's denial of habeas relief. *See Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014). Whereas the district court had identified deeply flawed fact-findings and legal reasoning in the last reasoned state court decision – the state habeas court's ruling (Appendix D) – the panel deemed the only relevant state court decision to be the Georgia Supreme Court's summary denial of CPC "because it is the final decision 'on the merits.'" *Wilson*, 774 F.3d at 678.[1] The panel therefore prefaced its analysis of the case by stating: "Instead of deferring to the reasoning of the state trial court, we ask whether there was any 'reasonable basis for the [Supreme Court of Georgia] to deny relief.'" *Id.* at 678

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[1] Quoting *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008).

(quoting *Richter*, 562 U.S. at 87). The panel proceeded to disregard the specific grounds the state habeas court articulated as the bases for its denial of relief, substituting instead the panel's own speculation as to hypothetical reasons for the Georgia Supreme Court's summary denial of CPC.

Mr. Wilson petitioned for rehearing *en banc*, arguing that the panel's decision was contrary to *Ylst* and *Johnson v. Williams*, 133 S. Ct. 1088 (2013), which require reviewing federal courts to "look through" a summary appellate decision to the last reasoned state court decision in order to determine the specific bases for the state court's ruling. Mr. Wilson also argued that proper application of *Ylst* would have required the court to grapple with the actual, unreasonable findings of the state habeas court and could have led to a different result.

The Eleventh Circuit granted rehearing *en banc* on July 30, 2015. After briefing and oral argument, in which Respondent expressed agreement with Mr. Wilson that the panel's approach violated *Ylst*,[2] on August 23, 2016, the Court issued a 6-5 ruling reaffirming that the panel's approach was appropriate and finding, effectively, that this Court's decision in *Richter* silently overruled *Ylst*. *See Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016) (Appendix A).

This Petition follows.

B. Statement of Relevant Facts

A jury sentenced Marion Wilson to death for the murder of Donovan Parks, who was killed by a single shot fired by Mr. Wilson's co-defendant Robert Butts. Mr. Wilson was 19 years old at the time. He would not be on death row today had his trial counsel put on a minimally competent mitigation case. Had they done their job, trial counsel would have discovered that Mr.

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[2] Indeed, because Respondent agreed with Mr. Wilson that *Ylst* required federal habeas courts to review the last reasoned decision, the Eleventh Circuit appointed *amicus* counsel to argue the position advanced by the panel decision. *See* Order dated September 23, 2015.

Wilson's childhood was one of stunning abuse and privation. The evidence introduced in the state habeas proceedings established that Mr. Wilson's upbringing was extremely chaotic, violent and traumatic. During his formative years, Mr. Wilson lived with a series of abusive, violent, alcoholic men in conditions that bring to mind life in a third-world slum. Yet Mr. Wilson was described by relatives and teachers as a "sweet" and "likeable" child who was "starving for some loving care in his life." Doc.12-9 at 11. Even after his juvenile troubles, his teachers and caseworkers saw potential "despite his harsh upbringing and criminal past." *Id.* at 21. All of the ingredients for a compelling mitigation defense were present and readily available to trial counsel; the jury that sentenced him to death heard virtually none of it.[3]

Mr. Wilson was represented at trial by two court-appointed attorneys: lead counsel Thomas O'Donnell Jr.[4] and Jon Philip Carr.[5] Doc.28 at 8. As the district court below found, neither O'Donnell nor Carr took any responsibility for preparing a mitigation case,[6] despite the trial court's

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[3] For further discussion of facts relating to the mitigating evidence available to counsel but never investigated or presented to Mr. Wilson's jury, see Petitioner-Appellant's initial brief to the Eleventh Circuit filed on July 24, 2014, at Statement of Facts, § II, incorporated herein by this reference.

[4] During his representation of Mr. Wilson, O'Donnell accepted an appointment with the Georgia Attorney General's Office. Doc.12-11 at 21-22; Doc.12-8 at 57. O'Donnell did not disclose this to the trial court or Mr. Wilson. Doc.12-8 at 60.

[5] Carr is now a convicted felon currently serving a twenty-five year sentence for child molestation. Doc.25-5. Carr's license to practice law was also suspended. *In re Carr*, 282 Ga. 138 (2007).

[6] O'Donnell and Carr had no capital-case experience, having never tried nor received training in such a case. Doc.12-8 at 31-32, 35; Doc.12-6 at 95. No one knew this, as O'Donnell affirmatively misrepresented his death penalty experience to the trial court. *Compare* Doc.8-12 at 6 (O'Donnell representing that he had tried a number of capital cases in the Middle Circuit) *with* Doc.12-8 at 34 (O'Donnell's habeas testimony that he had never tried a capital case).

repeated admonitions about its importance.[7] During habeas proceedings O'Donnell, Carr, and others involved in Mr. Wilson's trial testified that someone other than them was responsible for preparing the mitigation case and, thus, no one performed a constitutionally sufficient mitigation investigation. Doc.12-8 at 57-58; Doc.16-13 at 73-74; Doc.51 (district court order) at 40. Counsel's unreasonable failure to carry out a reasonably diligent investigation, acknowledged by the district court, prejudiced the outcome of Mr. Wilson's sentencing, where the lack of mitigating evidence allowed the prosecutor virtually free reign to characterize Mr. Wilson as nothing more than a cold blooded killer, even as evidence pointed to Robert Butts as the shooter and instigator of the crime.[8] The detailed and compelling mitigation case available to the defense bears virtually no resemblance to the cursory information presented to the sentencing jury. As a result, "[t]he jury labored under a profoundly misleading picture of [Wilson]'s moral culpability because the most important mitigating circumstances were completely withheld from it." *Ferrell v. Hall*, 640 F.3d 1199, 1236 (11th Cir. 2011).[9]

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[7] *See, e.g.*, Doc.8-10 at 9-10; Doc.8-13 at 25-26; Doc.8-19 at 2.

[8] *See, e.g.*, Doc.10-5 at 2397-98 (testimony that Butts had confessed to shooting Donovan Parks with a shotgun). Indeed, no evidence pointed to Marion Wilson as the shooter or instigator in the death of Mr. Parks, and the prosecutor admitted to the jury that he "[could not] prove who pulled the trigger in this case." Doc.10-1 at 5. At Robert Butts trial, however, the same prosecutor affirmatively argued and proved that "Butts . . . fired one fatal shot to the back of Parks's head with the shotgun." *Butts v. State*, 546 S.E.2d 472, 477 (Ga. 2001).

[9] *See, e.g., Porter v. McCollum*, 558 U.S. 30, 41 (2009) ("The judge and jury at Porter's sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. . . . Had Porter's counsel been effective, the . . . jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.' . . . Instead, they heard absolutely none of that evidence, evidence which 'might well have influenced the jury's appraisal of [Porter's] moral culpability'") (citations omitted).

The state habeas court articulated in its written opinion several specific reasons for denying Mr. Wilson's claim for relief under *Strickland v. Washington*, 466 U.S. 668 (1984). Prominent among them was a sweeping and flatly erroneous declaration that mitigating evidence presented in habeas proceedings recounting in detail Mr. Wilson's horrific upbringing would have been inadmissible in a Georgia capital sentencing proceeding. This and other spurious reasoning by the lower state court should have rendered Anti-Terrorism and Effective Death Penalty Act ("AEDPA") constraints on relief inoperative, but the initial panel of the Eleventh Circuit below failed to address the state court's reasoning and instead relied on other hypothetical reasons to justify the denial of relief in light of the Georgia Supreme Court's issuance of a summary denial of a CPC to appeal the lower court's order.[10] In so doing, the panel violated the rule of *Ylst*, which requires reviewing federal courts to "look through" summary orders such as the CPC denial to the last reasoned state-court decision based on the presumption that a summary ruling has adopted the reasoning given below. *See Ylst*, 501 U.S. at 803-05.

The slender *en banc* Eleventh Circuit majority found, in essence, that this Court in *Richter* silently overruled the "look through" doctrine set forth in *Ylst*, despite the well-established principle that "it is this Court's prerogative alone to overrule one of its precedents," *United States v. Hatter*, 532 U.S. 557, 567 (2001),[11] and this Court's continued application of *Ylst*'s look-through

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[10] A few prior Eleventh Circuit panel decisions had begun to take this unusual approach. *See, e.g., Hittson v. Warden*, 759 F.3d 1210, 1233 n.25 (11th Cir. 2014). In *Hittson*, the panel's approach was explicitly criticized as contravening *Ylst* by Justices Kagan and Ginsburg, concurring in denial of certiorari: "The Eleventh Circuit plainly erred in discarding *Ylst*." *Hittson v. Chatman*, 135 S. Ct. 2126, 2128 (2015) (Ginsburg, J., concurring). The Justices further stated that the then-pending rehearing petition in *this* case "afford[ed] the Eleventh Circuit an opportunity to correct its error without the need for this Court to intervene." *Id.*

[11] This Court recently reaffirmed this principle in its decision in *Bosse v. Oklahoma*, Case No. 15-9173, 2016 U.S. Lexis 2030 (Oct. 11, 2016) at *3 (quoting *Hohn v. United States*, 524 U.

approach. *See, e.g., Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

HOW THE FEDERAL QUESTION WAS RAISED BELOW

After the Eleventh Circuit panel issued its decision in this case, Mr. Wilson requested rehearing by the *en banc* court as to whether the panel's approach to analyzing and deciding Mr. Wilson's claim under *Strickland* was in violation of *Ylst*. The *en banc* court agreed rehearing was appropriate, vacated the panel's decision, and, after briefing and oral argument, issued a 6-5 decision affirming the panel's approach. This Petition follows the decision of the *en banc* court.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. This Court Must Repudiate The Eleventh Circuit's New Rule Requiring Federal Habeas Courts To Manufacture Reasons To Justify The Georgia Supreme Court's Summary Denial Of A Certificate Of Probable Cause To Appeal Rather Than "Look Through" The Summary Denial To The Lower Court's Reasoned Decision.

Last year, this Court sent a message[12] to the Eleventh Circuit that it was straying off path in ruling[13] that *Richter* abrogated the presumption set forth in *Ylst*, that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst*, 501 U.S. at 803. As this Court underscored in *Brumfield*, federal courts conducting habeas review under 28 U.S.C. § 2254(d), must "look through" a state supreme court's summary ruling to "evaluate the state trial

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S. 236, 252-253 (1998)): "'Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.'"

[12] *See Hittson*, 135 S. Ct. at 2128 (Ginsburg, J., concurring in denial of certiorari).

[13] *See Hittson*, 759 F.3d at 1233, n. 25.

court's reasoned decision" for denying relief. *Brumfield*, 135 S. Ct. at 2276 (citing *Johnson*, 133 S. Ct. at 1094 n.1, and *Ylst*, 501 U.S. at 806).

Or, as Justice Ginsburg succinctly observed in a Georgia capital case decided three days before *Brumfield*: "The Eleventh Circuit plainly erred in discarding *Ylst*." *Hittson*, 135 S. Ct. at 2126 (Ginsburg, J., joined by Kagan, J.) (concurring in denial of certiorari on grounds this Court's error was harmless in that case, but explaining why the Court was wrong to conclude that *Richter* silently overruled *Ylst*).

Instead of correcting its error, a slender majority of the Eleventh Circuit doubled down on the initial *Wilson* panel's misinterpretation of *Richter* and flouted the clear warnings issued by Justices of this Court in *Hittson* and *Brumfield*. This Court should grant certiorari review to bring the Eleventh Circuit back in line with this Court's governing precedent (as well as the Eleventh Circuit's sister courts) by recognizing that a state court's *actual* reasoning continues to matter under the AEDPA and that effectuating that review requires federal courts to continue to look to the last reasoned state court decision when analyzing claims under 28 U.S.C. § 2254(d).

A. This Court's Decision In *Richter* Cannot Be Read To Silently Abrogate *Ylst*.

The Eleventh Circuit's determination that the "look through" approach required by *Ylst* no longer applies in federal habeas corpus cases arises from a misconstruction of *Richter*.

In *Jones v. Warden*, 753 F.3d 1171, 1182 (11th Cir. 2014), the Eleventh Circuit ruled that the Georgia Supreme Court's summary CPC denial, as the "final state-court determination" of the petitioner's ineffective assistance of counsel claim, was a merits ruling that, for purposes of federal habeas review, was "the relevant state court decision" and that, under *Richter*, the petitioner was required to show "there was no reasonable basis for the state court to deny relief." *Jones*, 753 F.3d

at 1182 (quoting *Newland*, 527 F.3d at 1199), and *Richter*, 562 U.S. at 98).[14] In *Hittson*, the Eleventh Circuit further explained:

> Prior to *Richter*, this circuit applied the Supreme Court's pre-AEDPA decision, *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), to "look through" summary decisions by state appellate courts – reviewing, under *§ 2254(d)*, "the last reasoned decision" by a state court. . . . In light of *Richter*'s directive – "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief," . . . we explained that "state appellate court[s'] [summary] affirmances warrant deference under AEDPA because 'the summary nature of a state court's decision does not lessen the deference that it is due,'" *Gill v. Mecusker*, 633 F.3d 1272, 1288 (11th Cir. 2011) (quoting *Wright v. Moore*, 278 F.3d 1245, 1254 (11th Cir. 2002)). Accordingly, we declined to "look through" a summary decision by a state appellate court and instead reviewed the record to see "whether the outcome of the state court proceedings permits a grant of habeas relief in this case." *Id.* (emphasis added) . . . .

Hittson, 759 F.3d at 1232 n.25 (citations omitted).[15]

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[14] The court's reliance on *Newland* was misplaced as that decision addressed the distinct question of what constitutes "clearly established Federal law" under 28 U.S.C. § 2254 (d)(1) at the time the state courts adjudicated petitioner's claims and identified the date of the Georgia Supreme Court's CPC denial as the cutoff date for that purpose. *See Newland*, 527 F.3d at 1197-1200. The state habeas court's reasoned decision, however, was the focus of the court's merits analysis. *See id.* at 1201-11.

[15] The Eleventh Circuit's reliance on its earlier decision in *Gill* is misplaced. In *Gill*, the court did not "decline[] to 'look through' a summary decision by a state appellate court" as it did not address or mention *Ylst* or its "look through" rule at all. *See Gill*, 633 F.3d at 1272-96. Rather, the court's discussion of *Richter*'s impact on habeas review arose in the context of responding to the petitioner's argument that the district court had erred in denying relief on a basis different from the trial court's rationale – a fact that likely explains why subsequent panel decisions continued to "look through" the Georgia Supreme Court's CPC denials to the underlying state habeas court decisions until the *Jones* panel, in reissuing its decision, adopted the current rule. *See, e.g.*, *Bishop v. Warden*, 726 F.3d 1243 (11th Cir. 2013) ("Our task is to determine whether the decision of the state habeas court was an unreasonable application of *Strickland*."); *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1318 (11th Cir. 2013) ("[W]e need not address the question of deficient performance because the state habeas court's finding that Gissendaner had failed to demonstrate the requisite prejudice did not involve an unreasonable application of *Strickland* or an unreasonable determination of fact.").

Now, in *Wilson*, the Eleventh Circuit has concluded that this approach is correct: a summary CPC denial by the Georgia Supreme Court is the state court decision that must be assessed for reasonableness under AEDPA, not the underlying reasoned decision by the state habeas court. *Wilson*, 834 F.3d at 1235. Thus, according to *Wilson*, even if the state habeas court's reasoned decision unreasonably determines facts or unreasonably applies U.S. Supreme Court precedent, reviewing federal courts can ignore those errors and instead conjure up any reasonable hypothetical basis for the Georgia Supreme Court's summary denial of the merits of a state habeas petitioner's claims. *Id.* at 1238. This approach goes well beyond the rationale and scope of *Richter*.

The Eleventh Circuit's conclusion that *Richter* silently overruled *Ylst* is predicated on an unjustified expansion of *Richter*'s narrow holding removed from its actual context. *Richter* addressed how a federal court should analyze a state court merits ruling when the state court record lacked *any* articulated basis for the ruling.[16] There, the California Supreme Court had summarily denied an original habeas corpus petition and no state court had otherwise addressed the claim. *See Richter*, 562 U.S. at 96-97. This Court held that in such circumstances, where the state courts have never provided any reasons for denying a claim on the merits, a federal court cannot disturb the state court decision unless the petitioner satisfies the constraints of § 2254(d):

> Under § 2254(d), a habeas court must determine what arguments or theories supported *or, as here, could have supported*, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this

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[16] The *Richter* situation is not presented in federal habeas cases arising in Georgia. By Georgia statute, a state habeas court must "make written findings of fact and conclusions of law upon which the judgment is based." O.C.G.A. § 9-14-49. *See, e.g., Hughes v. State*, 273 Ga. 804 (2001) (vacating and remanding case due to habeas court's failure to make the requisite findings of fact and conclusions of law).

> Court. The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)."

Richter, 562 U.S. at 102 (emphasis added) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)).

This passage from *Richter* clearly states that, when reviewing a reasoned state court merits ruling, a federal court "must determine what arguments or theories supported . . . the state court's decision." *Richter*, 562 U.S. at 102. Only when the state gives *no* reasons for its merits ruling should a federal court "determine what arguments or theories . . . could have supported, the state court's decision." *Id.* Nothing in *Richter* is inconsistent with the holding of *Ylst* that a silent state court ruling is presumed to adopt the reasoning of the last reasoned state court ruling it upholds.[17] *See also Brumfield*, 135 S.Ct. at 2282-83 (explaining that *Richter* "requir[es a] federal habeas court to defer to hypothetical reasons state court might have given for rejecting federal claim where there is no 'opinion explaining the reasons relief has been denied'").[18]

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[17] *Ylst*'s "look through" rule is a rule of interpretation. It gives meaning to a summary decision that leaves in place an earlier reasoned decision. As Justice Scalia explained in *Ylst*, "[t]he maxim is that silence implies consent, not the opposite .... The essence of unexplained orders is that they say nothing." *Ylst*, 501 U.S. at 804. Accordingly, "a presumption which gives them no effect – which simply 'looks through' them to the last reasoned decision – most nearly reflects the role they are ordinarily intended to play." *Id.*

The intended meaning of such "formulary order[s]" is wholly independent of the role state court decisions play in federal habeas review and there accordingly is no reason to find that that meaning has been modified or abridged by AEDPA's constraints on granting relief in federal court. In other words, there is no reason to interpret a summary state court ruling that leaves undisturbed an earlier reasoned state court decision any differently after AEDPA than before. It remains the case that "silence implies consent, not the opposite" and that "[t]he essence of unexplained orders is that they say nothing." *Ylst*, 501 U.S. at 804.

[18] Thus, *Richter* is not a license to focus only on state court "outcomes" or disregard faulty state court reasoning that would satisfy § 2254 (d), as the Eleventh Circuit has erroneously suggested in *Gill*. *See* 633 F.3d at 1292 ("Nothing in the language of AEDPA required the district court to evaluate or rely upon the correctness [of] the state court's process of reasoning.").

Richter, in fact, cites *Ylst* with approval, *see Richter*, 562 U.S. at 99-100, and does so in a way that demonstrates the continued vitality of *Ylst*. As Justice Ginsburg explained in *Hittson*:

> Although *Richter* required a federal habeas court to presume that an unexplained summary affirmance adjudicated the merits of any federal claim presented to the state court, *Richter* cited *Ylst* as an example of how this "presumption may be overcome." 562 U.S., at 99. If looking through the summary affirmance reveals that the last reasoned state court decision found a claim procedurally defaulted, then it is "more likely," *id.*, at 100, that the summary affirmance of that claim "rest[ed] upon the same ground," *Ylst*, 501 U.S., at 803. In short, *Richter* instructs that federal habeas courts should continue to "look through" even nondiscretionary adjudications to determine whether a claim was procedurally defaulted. There is no reason not to "look through" such adjudications, as well, to determine the particular reasons why the state court rejected the claim on the merits.

Hittson, 135 S. Ct. at 2128 (Ginsburg, J., concurring in denial of certiorari).

B. This Court Continues To Apply The *Ylst* Presumption Post-*Richter*.

That *Richter* had no effect on *Ylst* is abundantly clear from the fact that this Court's decisions post-*Richter* continue to apply its "look through" doctrine as the proper method for analyzing silent state court decisions that leave undisturbed a prior reasoned state court decision. Although this Court recently underscored the continued vitality of the *Ylst* presumption, *see Brumfield*, 135 S. Ct. at 2276, *Brumfield* is among the most recent of many decisions that have applied *Ylst* in *Richter*'s wake.

In *Premo v. Moore*, 562 U.S. 115 (2011), a case decided the same day as *Richter*,[19] this Court analyzed the state habeas court decision, as the Oregon Court of Appeals had "affirmed without opinion," *Moore v. Palmateer*, 26 P.3d 191 (Ore. App. 2001), and the Oregon Supreme

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[19] As the Court observed in *Moore*, "[t]his case calls for determinations parallel in some respect to those discussed in today's opinion in *Harrington v. Richter* . . . ." *Moore*, 562 U.S. at 118.

Court denied review, *Moore v. Palmateer*, 30 P.3d 1184 (Ore. 2001). In *Johnson v. Williams*, the Court observed that the Ninth Circuit, "[c]onsistent with . . . *Ylst* ... 'look[ed] through' the California Supreme Court's summary denial of Williams' petition for review and examined the California Court of Appeal's opinion, the last reasoned state-court decision to address" the claim. *Johnson*, 133 S. Ct. at 1094 n.1. *See also, e.g., Foster*, 136 S. Ct. at 1745-47 (looking to state habeas court's analysis to determine jurisdictional issue, rather than speculating about what the Georgia Supreme Court's CPC denial may have meant); *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) ("The Michigan Court of Appeals' decision was not contrary to any clearly established holding of this Court"); *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) ("The Michigan Court of Appeals' conclusion that Toca's advice satisfied *Strickland* fell within the bounds of reasonableness under AEDPA . . . ."); *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012) (granting relief where "the Michigan Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it").[20]

Most recently, this Court's decision in *Kernan v. Hinojosa*, 136 S. Ct. 1603 (2016), again illustrates that the rebuttable presumption set forth in *Ylst*, that a summary state court ruling rests on the reasons set forth in the last reasoned state court decision, continues to apply to federal habeas review. In *Hinojosa*, this Court reversed a Ninth Circuit ruling applying *Ylst* to find that a

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[20] In *Woods v. Etherton*, 136 S. Ct. 1149 (2016), additionally, this Court reversed the judgment of the Sixth Circuit Court of Appeals because it had failed to accord appropriate deference to the state habeas court's merits determination of an ineffective assistance of counsel claim. *See id.* at 1153 ("Given AEDPA, both Etherton's appellate counsel and the state habeas court were to be afforded the benefit of the doubt."). In that case, the Michigan Supreme Court had denied review "because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.580(D)." *People v. Etherton*, 789 N.W.2d 478 (Mich. 2010). That statute, in turn, requires a habeas petitioner who has lost on the merits to demonstrate good grounds for failing to raise the claim on appeal *and* "actual prejudice from the alleged irregularities that support the claim for relief." MCR 6:508(D)(3).

California Supreme Court's summary rejection of a habeas petition was based on the same procedural ground supporting a lower habeas court's dismissal of the claim, rather than the court's merits review. This Court reversed not because the Ninth Circuit had erred in applying *Ylst*, but because, under the facts, *Ylst*'s presumption had been rebutted, explaining:

> We adopted [the *Ylst*] presumption because "silence implies consent, not the opposite – and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." . . . But we pointedly refused to make the presumption irrebuttable; "strong evidence can refute it."
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> It is amply refuted here.

Hinojosa, 136 S. Ct. at 1605-06 (quoting *Ylst*, 501 U.S. at 803). Here, the *Ylst* presumption was rebutted because the petitioner had filed an original habeas petition in the California Supreme Court, rather than appealing the lower court ruling, and the basis for the lower court's dismissal of the petition – improper venue – could not have sustained the California Supreme Court's decision, since the original habeas petition was properly before that court. *See id.* at 1606. Accordingly, the California Supreme Court's summary denial "quite obviously rested upon some different ground. *Ylst*'s 'look-through' approach is therefore inapplicable." *Id.*

Indeed, this Court's continued application of *Ylst*'s "look through" doctrine readily follows from the fact that the "look through" approach is wholly consistent with AEDPA's focus on what the state courts actually did. By contrast, the Eleventh Circuit's approach contravenes AEDPA's express language, which makes clear that a federal court must "train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's federal claims,"[21] in

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[21] *Hittson*, 135 S. Ct. at 2126 (Ginsburg, J., joined by Kagan, J.) (concurring in denial of certiorari but concluding that the Eleventh Circuit "plainly erred in discarding *Ylst*").

order to assess whether the state court merits adjudication "*involved an unreasonable application* of[] clearly established Federal law" or "resulted in a *decision that was based on an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2) (emphasis added). Under AEDPA, when a state court has denied a federal claim on the merits, a federal court may not grant habeas corpus relief unless the state court's merits ruling was legally or factually "unreasonable." That analysis cannot be made if, as the Eleventh Circuit has held,[22] the actual reasons for the state court decision are ignored as irrelevant, simply because the final state court ruling summarily ratified an earlier reasoned decision.[23]

The conclusion reached by the Eleventh Circuit that *Richter* silently abrogated *Ylst*'s "look through" doctrine is an unjustified and erroneous departure from AEDPA's clear commands and this Court's governing precedent. This Court must correct the error and return the focus of federal habeas inquiry back where it belongs – on the actual, not phantom, legal analysis and factual findings supporting the state court's merits determinations.

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[22] *See, e.g., Lucas v. Warden*, 771 F.3d 785, 792 (11th Cir. 2014); *Hittson*, 759 F.3d at 1233, n. 25; *Jones*, 753 F.3d at 1182.

[23] As this Court explained in a post-*Richter* decision:

> Our cases emphasize that review under § 2254(d) (1) focuses on what a state court knew *and did*. . . . To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" *and how the decision "confronts [the] set of facts" that were before the state court*. . . . If the state-court decision "identifies the correct governing legal principle" in existence at the time, a federal court must assess *whether the decision "unreasonably applies that principle to the facts of the prisoner's case."*

Cullen v. Pinholster, 131 S. Ct. 1388, 1399 (2011) (citations omitted) (emphasis added).

C. The *Wilson* Majority's Focus On Whether A Summary Denial Was Discretionary Or Not Creates A Distinction Without A Difference.

The *Wilson* majority is dismissive of *Brumfield* and other examples of this Court "looking through" a summary disposition to the last reasoned decision as the recounting of uncontroversial instances of "looking through" discretionary appellate denials to locate the operative "adjudication on the merits." *Wilson*, 834 F.3d at 1240. The court's focus on discretionary versus mandatory review does not bear scrutiny.

As Justice Ginsburg acknowledged in *Hittson*,[24] *Ylst* itself involved a non-discretionary, original application for habeas filed in the California Supreme Court. *See Ylst*, 501 U.S. at 800; *see also Carey v. Saffold*, 536 U.S. 214, 221-23 (2002) (explaining California's unique system of original writs). Unless the case was dismissed on procedural grounds (and there is no suggestion it was), it was decided "on the merits" by the California Supreme Court. That, however, did not mean the state court's mandatory review erased the procedural default found in an earlier lower court ruling, as the Ninth Circuit held in *Ylst*. *See Ylst*, 501 U.S. at 802. Rather, as this Court explained, a silent mandatory denial of the claim was presumed to rest on the same grounds expressed in the last reasoned decision. *Id.* at 803-04. Contrary to the *Wilson* majority's contention, *Ylst* itself stands for the proposition that a federal court should "look through" even a merits-based denial to consider the last-reasoned state court decision.

Moore is not to the contrary. The *Wilson* majority agreed (*see Wilson*, 834 F.3d at 1241) with *amicus*' claim that *Moore* applied *Richter*'s test because the Supreme Court observed that "[t]he state postconviction court *reasonably could have concluded* that Moore was not prejudiced

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[24] *See Hittson*, 135 S. Ct. at 2128 (Ginsburg, J., concurring) (citing *Ylst*, 501 U.S. at 800-01).

by counsel's actions. Under AEDPA, that finding ends federal review. *Richter*, 562 U.S. at __, 131 S. Ct. 770." AC Brief at 19 (quoting *Moore*, 562 U.S. at 131) (original emphasis). This Court in *Moore*, however, remained focused throughout on the last reasoned state court decision – that of the state habeas court – and not the summary denial on the merits by the intermediate court of appeals. *Moore*, 562 U.S. at 119, 123, 128.[25] Because the state habeas court, in denying the ineffective-assistance claim, on grounds "that any 'motion to suppress would have been fruitless,'" without "specify[ing] whether this was because there was no deficient performance under *Strickland* or because Moore suffered no *Strickland* prejudice, or both," *id.* at 123, the Supreme Court was required to fill in gaps in the state habeas court's reasoning. Had the *Moore* Court construed *Richter* to require that it look to the last merits ruling, rather than the last reasoned decision, however, the state habeas court's analysis of the fruitlessness of moving to suppress Moore's statements would have been "irrelevant" because the intermediate appellate court "ha[d] subsequently acted." AC Brief at 1.

The critical line the *Wilson* majority seeks to draw between denials of discretionary and mandatory review (*see Wilson*, 834 F.3d at 1240-41), moreover, is not nearly as simple and clean as the majority believes it to be. The *Wilson* majority contends, for instance, that this Court's recent application of *Ylst*, in *Brumfield*, proves nothing because, unlike this case, *Brumfield*

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[25] Judge Jill Pryor, writing in dissent in *Wilson*, agreed:

> *Moore* should guide our analysis here: it demonstrates that federal habeas courts should (1) presume that the state appellate court adopted the lower court's reasoning, (2) identify the actual reasoning set forth in the lower court's decision, and then (3) apply the reasoned-decision approach to determine whether those reasons are entitled to deference under § 2254(d).

Wilson, 834 F.3d at 1259 (Pryor, Jill, J., dissenting).

involved the Louisiana's Supreme Court's denial of a supervisory writ to review the habeas court's ruling, a discretionary denial of review the *Wilson* majority concludes was not an adjudication on the merits. *See Wilson*, 834 F.3d at 1240. But the distinction the *Wilson* majority seeks to carve does not bear close scrutiny. Although the *Wilson* majority contends the Louisiana Supreme Court's discretionary denial of review was not eligible for *Richter's* treatment because it was not an adjudication on the merits and thus was not a 'decision' within the meaning of § 2254(d)(1), this effort to pigeonhole Louisiana procedure falls flat.

It is not the case that the Louisiana Supreme Court's denial of a discretionary writ cannot constitute a merits ruling. To the contrary, the Louisiana Supreme Court often denies supervisory and other types of discretionary writs[26] in the course of a *per curiam* opinion addressing the issues before it. *See, e.g., State v. Derrick Lee*, 181 So. 3d 631 (La. 2015) (denying petition for writ of certiorari to review the state habeas court's denial of relief in a capital case, but issuing multi-page *per curiam* opinion disposing of the issues); *State ex rel. Scales v. State*, 718 So. 2d 402 (La. 1998) (denying supervisory writ in capital case in *per curiam* opinion addressing the merits of petitioner's claims and noting its "review [of] the trial record, the pleadings, and all the post-conviction hearing transcripts"); *see also, e.g., State v. Tillman*, No. 2015-KP-0635, 2015 La. LEXIS 1933 (La. Sept. 25, 2015); *State v. David Lee*, 946 So. 2d 174 (La. 2007); *State v. Jacob*, 476 So.2d 333 (La. 1985). These are mere examples of a fairly routine practice.

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[26] La. Sup. Ct. Rule 10(1)(a) provides that "[t]he grant or denial of an application for writs rests within the sound judicial discretion of this court," which is guided by several considerations that are "neither controlling nor fully measuring the court's discretion," though they "indicate the character of the reasons that will be considered, one or more of which must ordinarily be present in order for an application to be granted."

It seems inconceivable that such *per curiam* decisions, issued in the course of the state supreme court's denial of review, would be given no effect in federal habeas proceedings because they were rendered in the context of a discretionary denial of review. Instead, it is clear, such decisions illustrate that the distinction on which the *Wilson* majority has focused is blurred at best and cannot provide a solid foundation for the position the *Wilson* majority espouses. Moreover, the vagaries of Louisiana practice forcefully underscore that *Brumfield*'s reliance on *Ylst* should dispose of this issue, illustrating that the "look through" rule applies when reviewing a Georgia Supreme Court summary CPC denial and that the Eleventh Circuit's determination to the contrary is wrong.

D. Contrary To The *Wilson* Majority's Lip-Service To Federalism/Comity Concerns, Its Interpetation Of *Richter* Mandates, Perversely, That Reviewing Federal Courts Disregard Georgia State Habeas Courts' Time And Resource-Intensive Fact-Finding Process.

The *Wilson* majority's assertion that principles of federalism and comity militate in favor of its interpretation of *Richter* is risible.[27] In fact, the Eleventh Circuit's approach is profoundly disrespectful of the purpose and structure of Georgia's habeas corpus schema. As Judge Jordan wrote in dissent:

> The majority opinion tramples on the principles of federalism and comity that underlie federal collateral review. By rejecting a look-through presumption, the majority opinion treats the reasoned opinion of a Georgia superior court as a nullity merely because the Georgia Supreme Court subsequently rendered a summary decision. Although the Georgia Supreme Court has never explicitly stated that its summary decisions indicate agreement with the superior court's reasoning, there

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[27] *See, e.g., Wilson*, 834 F.3d at 1237 ("It makes no sense, and would run counter to principles of federalism and comity, to constrain state courts in their use of summary affirmances in a way that we do not constrain ourselves."); *id.* at 1238 ("Wilson and Georgia would have us ignore these interests of federalism and comity and impose opinion-writing standards on state appellate courts.").

> are good reasons to conclude that the Georgia Supreme Court's silence indicates agreement with and adoption of the lower court's reasoning.
>
> This inference is supported by the way in which Georgia has structured its habeas system to require a superior court to render a reasoned decision denying relief only after discovery and an evidentiary hearing while allowing the Georgia Supreme Court to issue a summary decision denying review; the Georgia Supreme Court's practice of issuing a reasoned decision denying an application for a certificate of probable cause when it disagrees with the superior court's reasoning; and the Georgia Supreme Court's continued use of summary decisions despite knowing that the United States Supreme Court on direct review treats its silence as indicating agreement with and adoption of the superior court's reasoning.
>
> By requiring federal habeas courts to ignore this evidence about what the Georgia Supreme Court intended its summary decision to mean, the majority opinion violates the principles of federalism and comity that serve as the foundation for deference to state court proceedings under § 2254(d).

Wilson, 834 F.3d at 1248 (Jordan, J., dissenting). Similarly, Judge Jill Pryor explained in her dissent:

> [W]e should adopt a look-through presumption because it best honors principles of federalism and comity. . . . First, although the Georgia Supreme Court has never stated explicitly that it agrees with the superior court's reasons for rejecting a petitioner's claims when it renders a summary decision, there is strong support for the inference in Georgia procedure and the Georgia Supreme Court's practices.
>
> Second, although principles of federalism and comity prohibit a federal habeas court from forcing a state court to set forth reasons why it rejected a petitioner's claim, contrary to the majority's contention looking through imposes no opinion-writing standard. This is because a state appellate court can overcome the look-through presumption by something as simple as issuing a one-sentence summary decision stating that it disagrees with the lower court's reasoning but agrees that the petitioner is not entitled to relief.
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> Third, looking through allows federal habeas courts to respect and give effect to the different ways that states have chosen to structure their collateral review systems. More specifically, looking through allows federal habeas courts to treat a summary state appellate court decision that is the product of a state collateral review system in which no state court has rendered a reasoned decision differently from a summary state appellate court decision that is the product of a state collateral review system in which a lower court has rendered a reasoned decision.

Wilson, 834 F.3d at 1260-61 (Pryor, Jill, *J.*, dissenting).[28]

Judges Jordan and Pryor are right. When Georgia revamped its habeas corpus laws in 1967, it did so for the express purpose of matching the expansion of federal habeas corpus in federal court in order to meet "its responsibilities under the Supremacy Clause to vindicate federally-guaranteed, federally-protected rights in the administration of justice," and it placed primary responsibility for doing so with the superior courts. *See Peters v. Rutledge*, 397 F.2d 731, 736 and 736 n.11 (5th Cir. 1968) (discussing and quoting Georgia Habeas Act of 1967, Section 1).[29] Both that purpose, and the central importance of the superior courts to effectuating it, remain enshrined in Georgia's current habeas statute. *See* O.C.G.A. § 9-14-40(a); O.C.G.A. § 9-14-40(b) (setting forth legislative finding "that expansion of state habeas corpus to include many sharply contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases"); *see also, e.g.*, *McCorquodale v. Stynchcombe*, 239 Ga. 138, 141 (1977) ("The Act further gave the superior courts exclusive jurisdiction to try such cases because of 'many sharply contested issues of a factual nature.'").

In accordance with that purpose, Georgia's statutory scheme authorizes the superior court to "resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves," O.C.G.A. § 9-14-48(c); requires the superior court to "review the trial record and transcript of

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[28] Judge Pryor also noted that she "disagree[d] with the majority's argument that looking through is inappropriate because federal appellate courts do not treat their summary decisions as adopting the reasoning of lower courts. Federal practice should not dictate what a state appellate court's summary decision means, particularly where, as here, there is evidence that the Georgia Supreme Court implicitly adopted the lower court's reasoning." *Id.* at 1261.

[29] "[I]t is plain that it was the intent of the legislature in enacting that law to make the remedy more readily available to prisoners resorting to the Georgia courts and to facilitate a determination in each case of the ultimate issue of the legality or illegality of the imprisonment." *Johnson v. Caldwell*, 229 Ga. 548, 550 (1972).

proceedings" to ensure compliance with procedural rules; and mandates that "[a]fter reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgment is based," O.C.G.A. § 9-14-49.[30] And, on direct review (whether from a ruling adverse to the Warden or by the grant of CPC), the Supreme Court of Georgia accords substantial deference to the habeas court's factual findings and, at times, its legal conclusion as well. *See, e.g.*, ***Walker** v. Houston*, 277 Ga. 470, 470 (2003) ("The habeas court's determination that [petitioner] made both . . . showings [under *Strickland*] must be affirmed, unless we conclude that its 'factual findings are clearly erroneous or are legally insufficient to show ineffective assistance of counsel."); *Head v. Thomason*, 276 Ga. 434, 435 (2003) ("A habeas court's determination on a claim of ineffective assistance of counsel is to be affirmed unless the reviewing court concludes the habeas court's factual findings are clearly erroneous or are legally insufficient to show ineffective assistance of counsel."); *Turpin v. Todd*, 271 Ga. 386, 390 (1999) ("Factual determinations made by the habeas court are upheld on appeal unless clearly erroneous, i.e. there is no evidence to support them.")

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[30] As Respondent previously argued in this matter:

> In a capital state habeas proceeding, the parties spend years in discovery, conduct an evidentiary hearing during which an extensive record of evidence is created, and thoroughly brief the issues to the state habeas court. O.C.G.A. § 9-14-49 expressly requires habeas courts to "make written findings of fact and conclusions of law upon which the judgment is based: and if the court fails to do so, "the case must be vacated and remanded with instructions to the habeas court to enter a new order that complies with O.C.G.A. § 9-14-49." *Thomas v. State*, 284 Ga. 327, 328 (2008). These opinions can take years after briefing before they are issued and are, most often, quite lengthy in capital cases.

Supplemental Letter Reply Brief, filed in *Wilson v. Warden*, Eleventh Circuit Case No. 14-10681-P, October 16, 2015, at 4.

(citations omitted); *Head v. Hopper*, 241 Ga. 164, 165 (1978) ("The habeas court's finding that the appellant was given effective assistance of counsel has evidence in the record to support it and is, therefore, affirmed."); *Anglin v. Caldwell*, 227 Ga. 584, 584 (1971) (habeas court judgment "was amply supported by the evidence" where "the question of credibility of testimony in a habeas corpus hearing is vested in the hearing judge," and "credibility was an essential element in the conclusion of the trial judge in the present case").

The Georgia Supreme Court, moreover, will often remand to the superior court for reconsideration when the lower court has applied an incorrect standard, rather than simply determining the issue itself on the basis of the complete record before it on appeal. *See, e.g.*, *Shorter v. Waters*, 275 Ga. 581 (2002) ("Because we find that the habeas court was misled by certain language . . . into applying an inappropriate standard, we vacate the habeas court's decision and remand for application of the proper standard."); *Gaines v. Sikes*, 272 Ga. 123, 125 (2000) ("[B]ecause of the evidentiary and legal errors committed by the habeas court, we reverse the court's ruling and remand the case for the habeas court to apply the proper standard when evaluating Gaines's claim of ineffective assistance of counsel."); *Turpin v. Todd*, 268 Ga. 820, 830 (1997) ("[B]ecause the habeas court applied the incorrect legal standard, this case must be remanded to the habeas court for it to determine whether Todd has proven or can prove on remand that the alleged error actually prejudiced the sentencing phase of his trial.")

It is clear from the duties assigned to the superior court and the deference accorded its ruling on appeal that the heavy lifting in the typical habeas case is performed by the superior court. As such, it furthers the interests of federalism and comity to recognize the preeminent place that the superior court holds in Georgia's habeas corpus scheme by looking through a Georgia Supreme Court summary decision that leaves the superior court's ruling undisturbed, as *Ylst* commands.

Indeed, given the central role state habeas courts play in Georgia's statutory scheme and the substantial deference accorded their findings, it is entirely appropriate to infer that the Georgia Supreme Court agrees with their orders when summarily leaving them in place.[31] *Ylst*'s presumption that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground," is based on the sound "maxim that silence implies consent, not the opposite – and that courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Ylst*, 501 U.S. at 804. As such, "a presumption that gives [summary rulings] *no* effect – which simply 'looks through' them to the last reasoned decision – most nearly reflects the role they are ordinarily intended to play." *Id.* The presumption, this Court observed, promotes both "administrability" and "accuracy." *Id.* at 803.

The Court's reasoning in *Ylst* finds full support in the design of Georgia's habeas corpus scheme, centered as it is on the actions and conclusions of the state habeas court, and the Georgia Supreme Court's application of those laws, which accords substantial deference to the state habeas court's findings and, often, its legal reasoning when supported by the evidentiary record. The *Wilson* majority's decision to punt *Ylst* to the sidelines denigrates the state's chosen method of

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[31] Indeed, when the Georgia Supreme Court *disagrees* with some aspect of the lower court's opinion, it will from time to time deny CPC while also correcting errors it has noted in the state habeas court decision. *See, e.g.*, Order, dated March 28, 2014, in *Tollette v. Upton*, Ga. Sup. Ct. No. S13E1348 (denying CPC, but correcting state habeas court's incorrect prejudice analysis, but concluding the error did not affect the outcome); Order, dated September 9, 2013, in *Rivera v. Humphrey*, Ga. Sup. Ct. No. S13E0063 (denying CPC but correcting state habeas court's materiality standard, though finding the error immaterial); Order, dated January 12, 2009, in *Pace v. Schofield*, Ga. Sup. Ct. No. S08E0349 (denying CPC, but identifying state habeas court's erroneous prejudice analysis, though finding the error was inconsequential).

adjudicating habeas cases and would accordingly inflict a damaging blow to federalism and comity concerns.

II. This Court Must Rectify The Circuit Split Created By The *Wilson* Majority Opinion.

The *Wilson* majority opinion has created a troubling and unnecessary circuit split with its maverick approach to *Richter*. No other circuit has adopted the Eleventh Circuit's interpretation of *Richter*. Those circuits that have specifically addressed whether *Richter* impacted *Ylst*'s "look through" rule have rejected that argument. *See Cannedy v. Adams*, 706 F.3d 1148, 1157-59 (9th Cir. 2013) (rejecting dissenting judge's argument that *Richter* overruled *Ylst* and applying the look-through doctrine to find that the last reasoned state court opinion was an unreasonable application of *Strickland*), *rehearing denied* 733 F.3d 794, 795 (9th Cir. 2013) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) (arguing in favor of panel dissent's reasoning); *Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 526 (4th Cir. 2016) ("[W]e may assume that the Supreme Court of Virginia has endorsed the reasoning of the Circuit Court in denying Grueninger's claim, and it is that reasoning that we are to evaluate against the deferential standards of § 2254(d)."); *Woolley v. Rednour*, 702 F.3d 411, 422 (7th Cir. 2012) (observing that "[*Richter*] did not purport to disturb . . . *Ylst*," and accordingly "consider[ing] 'the last reasoned opinion on the claim' – here the opinion of the Illinois Appellate Court").

The First, Third, Fifth, and Sixth Circuits as well have continued to follow the look-through doctrine, even after *Richter*. *See, e.g., Sanchez v. Roden*, 753 F.3d 279, 298 n.13 (1st Cir. 2014); *Woodfox v. Cain*, 772 F.3d 358, 369-74 (5th Cir. 2014); *Wogenstahl v. Mitchell*, 668 F.3d 307, 340 (6th Cir. 2012); *Blystone v. Horn*, 664 F.3d 397, 417 n.15 (3d Cir. 2011).

As Judge Jill Pryor explained in dissent:

> The majority opinion provides no good reason for creating a circuit split. Its attack on the reasoning of the Fourth and Ninth Circuits is based on its flawed assumption that the unexplained-decision approach applies to all state court summary decisions, even where there is a reasoned decision from a lower state court. But . . . *Richter* does not address whether [a] federal habeas court should look through, and the majority opinion ignores that the Supreme Court in *Moore* implicitly looked through.

Wilson, 834 F.3d at 1260 (Pryor, Jill, J., dissenting).

CONCLUSION

This Court should grant Mr. Wilson's Petition in order to rectify an "extreme malfunction"[32] in the Eleventh Circuit's analysis in Mr. Wilson's case and to impose consistency on the decisions of the Eleventh Circuit Court of Appeals and its sister circuits in their adjudication of claims in federal habeas corpus proceedings.

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[32] *Richter*, 131 S. Ct. at 786.

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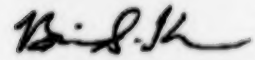

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2016

MARION WILSON,

Petitioner,

-v-

WARDEN,
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail and/or overnight courier on counsel for Respondent at the following address:

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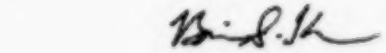
This the 10th day of November, 2016.



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